Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ROLAND J. SADOUX,

Petitioner,

v.

JAMES H. WESTMORELAND,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Can a signatory to an "exceedingly broad" arbitration clause avoid arbitration simply by suing an agent of another signatory to the arbitration clause when the alleged wrongful conduct of the agent was done in the course and scope of the agent's employment with the corporate signatory and the dispute falls within the scope of the arbitration clause?

(2) Under what circumstances may an agent of a corporate signatory to an arbitration clause enforce arbitration against another signatory under the Federal Arbitration Act?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Roland J. Sadoux, an individual, Petitioner.

James H. Westmoreland, an individual, Respondent.

Jan Hendrickx, an individual, was a named defendant in the trial court. The trial court found that Mr. Hendrickx was not served properly with process in the lawsuit, so he is not currently a party to the case.

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner and Defendant Roland J. Sadoux ("Sadoux"), under appropriate rules of this Court, files this Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Sadoux seeks a writ of *certiorari* to review the opinion in *Westmoreland v. Sadoux*, 299 F.3d 462 (5th Cir. 2002). (App. 1). In that opinion, a panel of the Court of Appeals for the Fifth Circuit vacated and remanded the order of the trial court referring this case to international arbitration. The Court held that Sadoux, an agent of a corporation who signed the arbitration agreement in his representative capacity, could not enforce the arbitration clause when he was sued as a named defendant. Sadoux acted at all relevant times in the course and scope of his employment with the corporate signatory of the agreement. (R. 56, 129, 134). With this opinion, the Court rejected the reasoning of the majority of federal circuits who have reached the issue.

The opinion at issue was an interlocutory appeal from an unreported Memorandum and Order by the Honorable Ewing Werlein, Jr., Judge of the United States District Court for the Southern District of Texas, Houston Division. (App. 10). Judge Werlein's initial opinion ordered the

parties to international arbitration in Paris, France. (App. 27).[1] The Court denied Westmoreland's Motion for Rehearing in another unreported opinion. (App. 28). The Court of Appeals agreed to hear the case after Judge Werlein certified his orders for interlocutory appeal under 28 U.S.C. § 1292(b). The Court vacated the order referring the case to arbitration, and denied Sadoux's Motion for Rehearing. (App. 9, 31).

JURISDICTION

(A) Sadoux seeks review of an opinion of the Court of Appeals entered as revised on August 13, 2002. (App. 1).

(B) The Court of Appeals denied Sadoux' Petition for Rehearing *En Banc*, which the Court also treated as a petition for panel rehearing, on August 26, 2002. (App. 31).

(C) This Court has jurisdiction to review the order of the Court of Appeals by a writ of *certiorari* under 28 U.S.C. § 1254(1).

(D) The Court of Appeals had jurisdiction of this case under 28 U.S.C. § 1292(b). The trial court certified its memoranda and orders of March 6, 2001 and April 25, 2001 for interlocutory appeal to the Court of Appeals. The

[1] Sadoux, also filed a Motion to Dismiss for Lack of Personal Jurisdiction, which was denied, and motions to dismiss for *forum non conveniens* and failure to join indispensable parties, which were denied as moot in light of the order granting the Motion to Compel Arbitration and Stay of Proceedings.

Court of Appeals granted leave to appeal on August 3, 2001.

(E) The district court has jurisdiction over this case under 28 U.S.C. § 1332 because there is complete diversity of citizenship between Westmoreland, a resident of Texas and Sadoux, a citizen of France, with his primary residence in the Dominican Republic and the amount in controversy exceeds $75,000.00.[2] Defendants properly removed the case to the court below pursuant to 28 U.S.C. § 1441. The district court also has jurisdiction over this case under 9 U.S.C. §§ 203 and 205 pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards because this case relates to an international arbitration agreement under the Convention. (App. 22).

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act, 9 U.S.C. § 3:

If any suit of proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or

[2] Jan Hendrickx ("Hendrickx") was named as a defendant in the court below, but the court granted his motion to quash service of process so Hendrickx is not currently a party to the case. However, for purposes of federal jurisdiction, Hendrickx is a citizen of Belgium, with his primary residence in the Dominican Republic.

proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

STATEMENT OF THE CASE

James Westmoreland ("Westmoreland") brought this action against Sadoux and Hendrickx for damages allegedly sustained as a result of the sale of his stock in Aston Holdings, Ltd. A.V.V. ("Aston Holdings"), a corporation organized under the laws of Aruba. (App. 2). Westmoreland claims generally that Sadoux and Hendrickx made misrepresentations that caused him to sell his seven percent interest in the company at a price below its fair value. (*Id.*) This appeal involves the scope of a very broad arbitration provision in the Shareholders Agreement that covers the ownership and management of Aston Holdings. (App. 33, 53).

This case was originally filed in the state court of Harris County, Texas. Sadoux timely removed the case to the United States District Court for the Southern District of Texas, Houston Division. The Honorable Ewing Werlein, Jr. granted Sadoux's motion to compel arbitration, and stayed further proceedings in this case to permit the parties to start international arbitration proceedings in Paris, France, pursuant to the terms of the arbitration clause in the Shareholders Agreement. (App. 10). Westmoreland filed a motion for the court to reconsider its order, but the court denied that motion in another

memorandum and order. (App. 28). The trial court granted the request to certify the orders on arbitration for interlocutory appeal, and the Court of Appeals granted leave to Westmoreland to appeal those orders. The Court of Appeals vacated the order referring the case to arbitration and remanded the case to the District Court for trial. (App. 9). The Court also denied the Petition for Rehearing. (App. 31).

I. Statement of Facts

Westmoreland is a lawyer who resides in Texas. (App. 12, 37). Sadoux is a citizen of France, who has his primary residence in the Dominican Republic. Sadoux owns Pentrade, Ltd. ("Pentrade"), a company organized under the laws of the Cayman Islands. (App. 12). Hendrickx is a citizen of Belgium, also with his primary residence in the Dominican Republic. (*Id.*). He owns T.D.C. Trade Development Company A.V.V. ("T.D.C."), a company organized under the laws of Aruba. (*Id.*).

Aston Holdings was a corporation organized under the laws of Aruba. It was formed in September 1996 for the sole purpose of owning and operating Dominicana Sanitary Services, B.V., formerly known as Dixi ("Dixi"), which had a contract with the government for the collection and disposal of waste in Santa Domingo in the Dominican Republic. (App. 11, 33). Pentrade and T.D.C. had advanced all the money to purchase Dixi from its prior owners. (App. 35).

A few months later, Westmoreland, Pentrade, T.D.C. and Angel Action Holdings, N.V. ("Angel Action") entered into a Shareholders Agreement and Addendum that provided for the ownership and operation of the company.

(App. 33). Westmoreland received his ownership interest for introducing Hendrickx to executives of BFI Industries, who was one of the prior owners of Dixi. The agreement provided that the shares in the new company would be held in the following percentages:

T.D.C.	45%
Angel Action	3%
Westmoreland	7%
Pentrade	45%

(App. 48).

The agreement also provided for certain restrictions on the sale or transfer of stock. (App. 36). No shareholder could dispose of any stock in Aston Holdings without obtaining the written consent of the holders of 90% of the shares in the company. (*Id.*). The agreement gave the shareholders in the company a right of first refusal with respect to the sale of any stock by another shareholder. (App. 40). The net income of the company would be distributed to the shareholders according to their respective share ownership in the company. (App. 37). All decisions regarding the daily operations of the company would be made by the holders of 90% of the outstanding and issued shares of the company. (App. 43). Westmoreland was paid in advance against the first distribution of profits for legal and marketing advice. (App. 37).

The original agreement provided that it would be governed and construed according to the laws of the Cayman Islands, and that the parties would agree to the jurisdiction of the courts in the Cayman Islands. (App. 46).

However, the parties signed an addendum to the Shareholders Agreement dated March 15, 1997. (App. 49). Under the terms of that addendum, the parties agreed that:

> This agreement shall be governed and construed in accordance with the laws of Aruba and the parties hereby agree to the jurisdiction of the Courts of Aruba and binding international arbitration in Paris, France.[3]

(App. 53). That addendum also reflected that Westmoreland received $10,000.00 for his legal and marketing advice. (App. 51). Later, Angel Action sold its three percent interest in Aston Holdings to T.D.C. and Pentrade, so those two companies owned ninety-three percent of the shares of Aston Holdings at times relevant to this case. Westmoreland does not dispute that he signed and agreed to be bound by the terms of the agreement and addendum.

Sadoux signed the Shareholder Agreement and Addendum in his capacity as a representative of Pentrade. (App. 48, 53). It is undisputed that everything he did with respect to the operation and sale of assets of Aston Holdings was as a representative of Pentrade. (R. 56, 129, 134). It is also undisputed that Sadoux personally never received any distribution of profits from the operation or sale of Dixi. (R. 56). All communications that Sadoux had with Westmoreland that related to the operation or sale of any

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[3] The Court will note that the original agreement did not have the arbitration clause, but simply had a provision on choice of law and jurisdiction. The addendum changed both choice of law and jurisdiction to Aruba, and added the arbitration clause. It is reasonable to assume that the parties discussed and had reasons for the changes.

assets of Aston Holdings were in his role as a representative and agent of Pentrade. (R. 56).

The terms and conditions concerning the sale of any stock in the company are set forth in the Shareholders Agreement and Addendum. Pursuant to the terms of the agreements, Westmoreland sold his shares in Aston Holdings to the corporate shareholders for a payment of $245,000.00. Westmoreland claims that Sadoux and Hendrickx made misrepresentations to him about the value of the company, and that his interest in the company was worth more than what he was paid for it. Pentrade and T.D.C. later sold their stock in the company to a third party.

Westmoreland sued Sadoux and Hendrickx to recover his share of the operating profits and the additional value of his stock in the company. Pursuant to the arbitration clause in the Shareholders Agreement, Sadoux moved to compel arbitration of the dispute in Paris, France. (App. 53). The trial court granted the motion, and denied a motion to reconsider. (App. 10, 28). Appeal followed when the trial judge certified his orders for interlocutory appeal; a panel for the Court of Appeals for the Fifth Circuit vacated the Order referring the case to arbitration and remanded the case for trial. (App. 1).

II. Summary of the Argument

This Court should grant *certiorari* because the Court of Appeals has rendered a decision on an important matter that conflicts directly with decisions of the Courts of Appeals for the Third, Fourth and Sixth Circuits. The issue before this Court is whether a party to an agreement containing an arbitration clause can sue to invoke his

rights under that agreement, but artfully plead around the arbitration clause by suing an individual agent of a corporate signatory to the same agreement rather than the corporate signatory itself. The Court of Appeals for the Third Circuit in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3rd Cir. 1993); the Court of Appeals for the Fourth Circuit in *Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001), *cert. denied*, ___ U.S. ___, 70 U.S.L.W. 3091 (2001); and the Court of Appeals for the Sixth Circuit in *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990) have held that an agent for a signatory to an arbitration provision can compel arbitration under state common law agency and contract principles. The Fifth Circuit's opinion and order in this case conflict directly with these decisions. Further, that opinion applied the wrong legal standard for the enforceability of an arbitration clause by substituting its own judgment for that of the trial court. If Sadoux cannot enforce arbitration in this instance, then every arbitration agreement is vulnerable, and the well-recognized benefits such agreements bring to national and international commerce will be rendered meaningless in the corporate setting if a signatory decides simply to sue an agent of another signatory for conduct taken on behalf of his principal.

ARGUMENT

As the Court is aware, there is a strong federal judicial policy that favors arbitration. *United Offshore Company v. Southern Deepwater Pipeline Co.*, 899 F.2d 405, 408 (5th Cir. 1990); *Employers Reinsurance of Wausau v. Bright Metal Specialties*, 251 F.3d 1316, 1322 (11th Cir. 2001). This policy is even stronger in cases involving

international commercial transactions. *Pennzoil Exploration and Production Co. v. Ramco Energy, Ltd.*, 139 F.3d 1061, 1065 (5th Cir. 1998) (federal policy "applies with special force in the field of international commerce"). All questions about the scope of an arbitration clause should be construed in favor of arbitration. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); *Sedco v. Pemex*, 767 F.2d 1140, 1145 (5th Cir. 1985). "Arbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that would cover the dispute at issue." (App. 23); *Pennzoil Exploration and Production Co.*, 139 F.3d at 1065. Here, the courts below were faced with a very broad arbitration clause in an agreement involving an international transaction. The strong policies in favor of arbitration are at a maximum in this case.

Sadoux requested that the trial court stay the litigation and compel the parties to arbitrate this dispute pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 U.S.T. 2517, T.I.P.A.S. No. 6957, 330 U.N.T.S. 38 [1970], published as a note in 9 U.S.C. Chapter 2. Sadoux also moved to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* because Congress incorporated the Federal Arbitration Act into the Convention. *McDermott International Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1208 (5th Cir. 1991). It is undisputed that France is a signatory to the convention, and that Sadoux and Pentrade are not citizens of the United States. The Shareholders Agreement deals with the stock ownership of a company doing business in the Dominican Republic, with shareholders who are a Texas individual, and two corporations organized

under the laws of Aruba and the Cayman Islands. (App. 22). The contract affects foreign commerce and is subject to the Convention and the Federal Arbitration Act. (*Id.*); *Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1280 (5th Cir. 1994).

Despite the broad policy in favor of arbitration, and the fact that Westmoreland signed the agreement himself, the Court of Appeals held that Westmoreland should not be bound by the arbitration clause because he sued Sadoux as an individual defendant. (App. 1). Sadoux respectfully submits that the Court's opinion is erroneous, conflicts with precedent established in the Third, Fourth and Sixth Circuits, and misapplies the law on the enforceability of arbitration clauses. Further, because the arbitration clause in the Shareholders' Agreement does indeed cover Westmoreland's claims in this case, Judge Werlein's decision to compel arbitration was correct. Therefore, Sadoux petitions this Court to issue a writ of *certiorari* to the Court of Appeals for the Fifth Circuit to review that Court's decision vacating the trial court's order compelling arbitration.

I. Westmoreland cannot avoid arbitration by suing an agent of a signatory to the agreement in his individual capacity.

A. The Fifth Circuit's opinion conflicts with decisions from other Circuits.

Based on the record in the trial court, it is undisputed that Sadoux was acting as an agent of Pentrade at all times in connection with the operation of Aston Holdings and his communications with Westmoreland about the company. (R. 56, 129, 134). Westmoreland would have to

agree that Pentrade could enforce the arbitration clause because Pentrade was a signatory to it; as such, Westmoreland is arguing here that he can avoid arbitration simply by naming an agent or employee of Pentrade individually. If Westmoreland is correct, the arbitration clause "would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." *Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001), *cert. denied*, ___ U.S. ___, 70 U.S.L.W. 3091 (2001).

It is not surprising that a number of courts have considered and rejected the argument that Westmoreland makes here. As Judge Werlein pointed out, the opinion of the Third Circuit in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3rd Cir. 1993) is instructive on this issue. (App. 24). In that case, the trustees of a pension plan filed an action against a brokerage firm and financial consultants for the plan to recover damages for breach of their fiduciary duties to the plan in violation of ERISA. Defendant Belinda Stewart was an employee of Merrill Lynch, but did not sign the arbitration agreement. The trial court ordered arbitration of the claims against all defendants including Stewart.

The trustees argued that their claims against Stewart individually should not go to arbitration because she was not a signatory to the agreement, although her employer was. *Id.* at 1121. The Court rejected this argument with an analysis that was "quite straightforward." *Id.* "Because a principal is bound under the terms of a valid arbitration clause, its agents, employees and representatives are also covered under the terms of such agreements." *Id.* (*citing Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir. 1990); *Letizia v. Prudential Bache Securities*, 802 F.2d

1185, 1187 (9th Cir. 1986)). The Court cited the federal policy favoring arbitration as part of its rationale. *Id.*

The Fourth Circuit reached a similar conclusion in *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001), *cert. denied*, ___ U.S. ___, 70 U.S.L.W. 3091 (2001). In that case, a shareholder brought an action against the corporation, its officers and other shareholders based on breach of fiduciary duty and other theories of liability for diversion of corporate funds for personal use. The shareholders of the corporation had entered into a shareholders agreement that provided for general restrictions on the transfer of stock, the right of first refusal for non-selling shareholders, and the redemption of each shareholders' stock upon termination of that person's employment with the company. The agreement also included an arbitration clause that provided: "Any dispute arising out of or relating to this agreement or the breach, termination or validity thereof will be submitted by the parties to binding arbitration." Pursuant to the terms of that agreement, defendants moved the trial court to compel arbitration, but the court denied that request.

The Court of Appeals reversed, citing the "healthy regard for the federal policy favoring arbitration" and pointed out that "when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Id.* at 316 (citing *People's Security Life Insurance Co. v. Monumental Life Insurance Co.*, 867 F.2d 809, 812 (4th Cir. 1989)). The Court rejected Long's argument that shareholders who did not sign the agreement could not invoke the arbitration clause. The Court pointed out that a non-signatory may invoke an arbitration clause under ordinary state law principals of agency

and contract. *Id.* at 320. The Court noted that the shareholders were all officers and directors of the company and controlled all the activities of the corporation. As a result, the facts and claims against a corporation and its shareholders were so closely intertwined that the claims against the non-signatory shareholders of the corporation were properly sent to arbitration even though they were not parties to the agreement.

Similarly, in *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir. 1990), the Sixth Circuit specifically recognized that the "majority view" allowed nonsignatory officers, directors and agents of the signatory corporation to compel arbitration. *Id.* at 1281-82. In that case, plaintiff Arnold sold his company to defendants. *Id.* at 1271. Defendant Arnold Corporation emerged through a series of mergers, liquidations, and renamings. *Id.* Pursuant to these transactions, plaintiff individually, and as trustee for his sons, acquired preferred and common stock for $300,000.00 and $100,000.00 respectively and was made chairman of the board of directors of what eventually became known as the Arnold Corporation. *Id.*

Subsequently, Plaintiff entered a stock purchase agreement with the Arnold Corporation selling his preferred and common stock for a total of approximately $2 million. *Id.* In this transaction, the common stock was valued at $13 per share. *Id.* However, Arnold Corporation accounted for the purchase by valuing the common stock at $10 per share. *Id.* The stock purchase agreement contained an arbitration clause encompassing "[a]ny dispute arising under th[e] Agreement." *Id.* Shortly thereafter, the individual defendants/board of directors of the Arnold Corporation embarked on a course of corporate management that significantly departed from how the

company was run while Arnold was a shareholder. Specifically, the new board authorized the payment of dividends for the first time, and eventually sold the common stock of Arnold Corporation to a third party for $60 per share at great personal gain to the individual defendants. *Id.* at 1271-72. Arnold then sued the corporate and individual defendants alleging securities violations, RICO violations, and common law fraud. *Id.*

The Sixth Circuit affirmed the trial court's decision to refer the plaintiffs' claims against the nonsignatory defendants to arbitration. *Id.* at 1281-82. The Court relied on the strong federal policy in favor of arbitration and stated, "if appellant 'can avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as [defendants] in his complaint, or signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified.'" *Id.* (quoting the opinion of the trial court, *Arnold v. Arnold Corp.*, 668 F. Supp. 625, 629 (N.D. Ohio 1987)). The court characterized its holding as in line with the majority view on the matter and based on the "well-settled principle affording agents the benefits of arbitration agreements made by their principal. . . ." *Id.*

The same reasoning applies here. Sadoux is the owner of Pentrade, and he is an authorized agent for the company. As in *Long* and *Arnold, supra*, Westmoreland's claims against Sadoux are based on his company's control of the operations of Aston Holdings. Pentrade and T.D.C. had significant control over Westmoreland's ability to sell his stock, which is one basis for Westmoreland's claim for damages. An agent or employee of a signatory to an arbitration agreement must be able to invoke the terms of that agreement or the arbitration clause would be

rendered meaningless. *Arnold v. Arnold Corp.*, 920 F.2d at 1281. *See also Smith/Enron Co-Generation Ltd. Partnership v. Smith Cogeneration International, Inc.*, 198 F.3d 88, 97 (2nd Cir. 1999), *cert. denied*, 531 U.S. 815 (2000) (no concern about imposing a contractual obligation to arbitrate on a non-party to the agreement when the party trying to escape the obligation to arbitrate is a signatory). Westmoreland should not be allowed to avoid his agreement to arbitrate with the other shareholders of Aston Holdings by trying to name Sadoux "in an individual capacity."

B. The case law relied on by the Court of Appeals does not justify the denial of arbitration.

The Fifth Circuit decided not to follow the majority view on this issue and reversed Judge Werlein's order compelling arbitration. (App. 1). In doing so, the Court relied on two opinions, *McCarthy v. Azure*, 22 F.3d 351(1st Cir. 1994) and *Britton v. Co-Op Banking Group*, 4 F.3d 742 (9th Cir. 1993). (*Id.*). A close reading of these cases does not support the judgment of the Court below.

In *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994), the plaintiff was an inventor who entered into three contracts with a religious cult: a purchase agreement with a narrow arbitration clause; a confidentiality agreement with an expansive arbitration clause; and an employment agreement with no arbitration clause. After these agreements were executed, the leader of the cult, Azure, fired the plaintiff and transferred the invention to a pre-existing corporation that was wholly unrelated to the agreements. Plaintiff sued Azure in both his "individual" and "representative" capacities, but abandoned the "representative"

capacity claims on appeal of the order denying arbitration. All of the plaintiff's claims were based upon the employment agreement. *Id.* at 361. The trial court denied Azure's motion to compel arbitration.

The Court of Appeals affirmed, and held the claims against Azure in his "individual" capacity were not subject to arbitration. The Court first found that Azure's right to arbitration was based solely on the purchase agreement. *Id.* at 354. The Court went on to hold, based on four separate grounds, that Azure's status as an agent of the corporate signatory to the purchase agreement was an exception in that case to the general rule that an agent may compel arbitration. Application of these four arguments here shows the difference between *McCarthy* and this case and compels a different result. In fact, the analysis in the case supports Sadoux.

The Court's first basis for rejecting Azure's motion to compel arbitration was that its interpretation of the purchase agreement indicated the parties did not intend for Azure to be covered under the arbitration clause. *Id.* at 357. In so holding, the Court distinguished cases like *Pritzker*, on which Judge Werlein relied, that involved ongoing relationships, from the "one-shot transaction" involved in the purchase agreement. *Id.* The Shareholders Agreement here, however, contemplated a continuing relationship where Westmoreland relied on Pentrade and T.D.C. to manage the company. Westmoreland had an interest in the profits generated by company operations. Thus, the Shareholders' Agreement contemplated an ongoing relationship among Westmoreland, Pentrade and T.D.C. in which Pentrade and T.D.C.'s promises could only be fulfilled by further (unspecified) acts of their agents, namely Sadoux, stretching well into the future. These

factors build into the Shareholders Agreement the intent to bring Sadoux within the arbitration clause. In this manner, interpreting the Shareholders Agreement under the *McCarthy* Court's analysis would support enforcement of the arbitration clause.

The second ground on which the Court refused to compel arbitration in *McCarthy* was that the purchase agreement's arbitration clause was narrower than the confidentiality agreement's arbitration clause, and thus indicated an intent by the parties to give the purchase agreement's arbitration clause a restrictive reading. *Id.* at 358-59. The arbitration clause in the Shareholders Agreement here, however, is "exceedingly broad." (App. 24). Judge Werlein's interpretation of that provision is supported by significant precedent establishing that a lack of limiting language in an arbitration clause requires expansive application of that clause. *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 650 (1986); *Webb v. Investicorp, Inc.*, 89 F.3d 252, 259 (5th Cir. 1996). The more expansive scope of the Shareholders Agreement's arbitration clause further distinguishes the *McCarthy* case.

Further, as noted above, the arbitration clause was added to the Shareholders Agreement through the later Addendum, which also made other changes. (App. 49). It is reasonable to assume that the parties discussed and negotiated these changes and additions. The addition of the broad arbitration clause, where none existed before, is a clear indication that the parties intended to arbitrate all disputes between and among them.

The third argument asserted by the Court in *McCarthy* to deny arbitration was that the "individual"/"representative" distinction may be important in cases involving *ultra vires* acts, breaches of a personal duty owed by the defendant directly to the plaintiff and, as in that case, where the corporate form is used to perpetrate a fraud. *Id.* at 359. In contrast, the Court stated that where the alleged wrongdoing occurred within the scope of the defendant's role as an agent of the signatory corporation, the defendant can enforce the arbitration clause. *Id.* (citing *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1114 (3rd Cir. 1993)). Here, it is undisputed that Sadoux acted at all times within the context of his role as an agent of Pentrade. Further, the Shareholders Agreement required Pentrade to make the communications regarding the performance of Dixi; the sale of Westmoreland's shares was to Pentrade, not Sadoux; and the ultimate sale of Dixi was by Pentrade, not Sadoux. Sadoux was simply carrying out Pentrade's duties and responsibilities under the Shareholders Agreement. Under these conditions, *McCarthy* directs that Sadoux may enforce the arbitration clause.

The Court's fourth argument was that the plaintiff's actual claims would not have been covered by the arbitration clause even if Azure could enforce it. *Id.* at 361. The plaintiff's claims involved the employment agreement, which contained no arbitration clause. *Id.* Here, the situation is different because the claims are all based upon or related to the Shareholders Agreement. The broad scope of the Shareholders Agreement's arbitration clause, combined with the strong presumption in favor of arbitration, fully supported Judge Werlein's decision. For these

reasons, the Court below erred in relying on *McCarthy* to reverse the order sending this case to arbitration.

Likewise, the opinion in *Britton v. Co-Op Banking Group*, 4 F.3d 742 (9th Cir. 1993) does not support the lower Court's decision. In that case, a divided panel denied arbitration to an individual who had purchased a corporation after it had signed an agreement containing an arbitration clause covering "[a]ny controversy arising out of or relating to th[e] Agreement," where the individual's alleged conduct involved "subsequent, independent acts of fraud, unrelated to any provision or interpretation of the contract." *Id.* at 748. The allegations against Sadoux are substantially different than the alleged conduct in *Britton* and compel a different result.

The arbitration clause in *Britton* was part of a contract between the signatory corporation, Gold Depository and Loan Company, and the plaintiffs that dealt with the sale, and subsequent lease, of storage containers. The plaintiffs initially alleged securities fraud against the corporation and its agents with respect to this transaction. *Id.* at 744-45. The nonsignatory defendant, Jeff Liebling, later acquired the signatory corporation and allegedly embarked on a scheme to defraud the plaintiffs into not pursuing their claims against the persons who originally sold the securities under the contract. *Id.* at 748. The plaintiffs then sued Liebling in his individual capacity for that conduct. Because the defendant's alleged acts related solely to the process of litigation arising out of the contract, rather than the subject matter of the contract itself, the Court held the arbitration clause did not apply to him.

Id. at 748. In doing so, the Court explained that the conduct at issue did not fall within the scope of the contract's arbitration clause. *Id.*[4]

Westmoreland's complaints about Sadoux, however, are inseparable from the Shareholders Agreement. The relationship and duties upon which Westmoreland bases his claim were created by and have their foundation in the Shareholder's Agreement. Further, there are no damages in this case if there is no Shareholder's Agreement. Indeed, as Judge Werlein observed, "It is not plausible to think that this controversy could be tried without substantial references being made to the Shareholders Agreement." (App. 29). The significant differences between *Britton* and this case leave the appellate court's decision without any colorable legal authority to support its denial of arbitration in this case.

In summary, the great weight of authority, and the strong policy in favor of arbitration, compel the conclusion that Sadoux can enforce the arbitration clause that he signed as the authorized agent for Pentrade. All of his dealings with Westmoreland related to Aston Holdings were as an agent and owner of Pentrade. Sadoux did not individually receive any proceeds from the operation or

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[4] As with its reliance on *McCarthy*, the appellate court's conclusion here is inconsistent with the basis of the opinion in *Britton*. Where the court in *Britton* expressly applied the standard articulated by the arbitration clause to determine the nonsignatory defendant's standing, "That leads us to the key question: Did any of Liebling's alleged wrongdoing . . . relate to or arise out of the contract . . . ," *Britton v. Co-op Banking Group*, 4 F.3d 742, 747 (9th Cir. 1993). The Court of Appeals in this case refused even to consider the scope of the arbitration clause in deciding whether Sadoux could enforce it. (App. 1).

sale of Dixi. Even more simple, it is settled that an agent or representative of a signatory to an arbitration provision may invoke its terms; otherwise, "the effect of the rule requiring arbitration would, in effect, be nullified." *Arnold v. Arnold Corp.*, 920 F.2d at 1281.

C. The Court of Appeals did not apply the proper standard to determine whether Sadoux can enforce the arbitration clause.

The Fifth Circuit rejected the view that an agent of a signatory may enforce an arbitration argument under state common law principles, which is the majority view on this issue. Instead, the Court below adopted the position that a signatory agent can only assert an arbitration clause in his individual capacity under the theory of equitable estoppel. That doctrine states that arbitration under these circumstances can only be compelled in limited circumstances: (1) when the signatory plaintiff must rely on the terms of the agreement to assert its claims or (2) when the signatory plaintiff alleges interdependent and concerted misconduct by the nonsignatory defendant and a signatory to the contract. (App. 8) (citing *Hill v. GE Power Systems, Inc.*, 282 F.3d 343, 348 (5th Cir. 2002)).

With this opinion, the Court treats all nonsignatories alike, regardless of whether they are complete strangers to the agreement whose conduct could not have been anticipated by the contracting parties, *see Grigson v. Creative Artists Agency*, 210 F.3d 524, *reh. en banc denied*, 218 F.3d 745 (table), *cert. denied*, 531 U.S. 1013 (2000), (nonsignatory talent agency allegedly interfered with contract between movie producers and distribution company by

pressuring distribution company into limited release of the movie), or they actually signed the agreement in a representative capacity and their conduct is intended by the parties to be deeply entrenched in the subject matter of the contract, *see McCarthy, supra* at 357 (contrasting cases where parties contemplated an ongoing relationship in which signatory's promises could only be fulfilled by further acts of their agents stretching well into the future). As set out above, the majority of Courts that have reached the issue have not limited the ability of an agent to enforce an arbitration clause to equitable estoppel; the Courts have allowed enforcement of the clause under simple agency and contract principles. Even so, the Court below compounded its error by misapplying the equitable estoppel standard.

Specifically, in *Hill,* the Fifth Circuit reviewed the trial court's decision on this issue under an abuse of discretion standard. *Hill, supra* at 348 (citing *Grigson*, 210 F.3d at 528). The trial court's decision would only be reversed if it was "'premised on an application of the law that is erroneous' or 'an assessment of the evidence that is clearly erroneous.'" *Id.* at 349 (quoting *Grigson*, 210 F.3d at 527). As a result, even though the appellate court in *Hill* believed that the nonsignatory defendant met the equitable estoppel test, it still refused to reverse the trial court's decision denying arbitration because, "the district court is better equipped to make the call than this court, and we do not lightly override that discretion." *Id.* The Court in this case, however, ignored the findings of Judge Werlein and, without comment, substituted its judgment that Westmoreland's claims did not seek to enforce any duty created by the Shareholders Agreement. In this

manner, the opinion in this case not only conflicts with decisions in other circuits, it violates its own precedent.

Even if Sadoux' right to compel arbitration here is limited to equitable estoppel, proper application of the doctrine in this context supports arbitration. In *Grigson, supra*, a trustee and producers of a movie sued Creative Artists and others for tortious interference with a distribution agreement for the movie. Creative Artists moved to compel arbitration under the distribution agreement even though they did not sign it. The trial court granted the motion and held that Plaintiffs were equitably estopped from avoiding arbitration because the claims were intertwined with, and dependent upon the distribution agreement.

The appellate court affirmed pointing out that: "Arbitration is favored in the law," and "The parties to such agreements cannot avoid them by casting their claims in tort rather than in contract." *Id.* at 526. The Court adopted the reasoning of the Eleventh Circuit in *MJ Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999), that held that the doctrine of equitable estoppel would apply if the claims in the case are intertwined with the contract. *Id.* at 527. The Court found easily that Creative Artists could enforce the clause even though they did not sign the agreement. *Id.* at 528.

In the course of the opinion, the Court emphasized that: "the linchpin for equitable estoppel is equity-fairness." *Id.* The Court felt that the issue of detrimental reliance was a significant factor in the analysis. That reasoning applies with equal force here. Westmoreland signed the agreement, but he is the party trying to avoid arbitration. Pentrade, through its owner and agent, relied

on the arbitration clause as part of the Shareholders Agreement in order to avoid more costly litigation. *Id.* at 528. Arbitration was important enough to the parties that they added the clause in a separate addendum. It is unfair to deprive Pentrade of a right in the agreement simply because Westmoreland sued its owner rather than the company. *See also Choctaw Generation Ltd. v. American Home Assurance Co.*, 271 F.3d 403 (2nd Cir. 2001) (party estopped from avoiding arbitration with nonsignatory of agreement because issues intertwined with contract).

There is a second basis for applying the doctrine of equitable estoppel here to compel arbitration with an agent of a signatory to the addendum. As the Court pointed out in *Smith/Enron Co-Generation Ltd. Partnership,* 198 F.3d at 97, a party may be compelled to arbitrate because he derived other benefits under the agreement containing the arbitration clause. *Id.* at 98, *citing Thomson-CSF v. American Arbitration Association,* 64 F.3d 773, 779 (2nd Cir. 1995). A party cannot avoid enforcement of an arbitration provision when he is trying to enforce other provisions of the contract to his benefit. *International Paper Co. v. Schwabedissen Machinen and Anlagen*, 206 F.3d 411, 418 (4th Cir. 2000).

Here, Westmoreland sued to recover his share of the distribution of profits from the operations of the company, and for the alleged fair value of his stock interest. He is entitled to such a recovery, if at all, only under the terms of the Shareholders Agreement. Regardless of the cause of action, he has no right to recover income or the value of the stock but for the agreement with the arbitration provision. As Judge Werlein found, the "entire setting" for the alleged fraud "arises out of and bears a significant relationship to the Shareholders Agreement." (App. 29).

The Shareholders Agreement provides that Pentrade and T.D.C. have significant control over the operations and transfer or sale of stock in the company. Westmoreland claims that Sadoux and Hendrickx misused their control over the company to defraud him. He also claims they used their superior knowledge of the company's affairs to hide information from him. They were able to do so, if at all, because of the provisions of the Shareholders Agreement. "It is not plausible to think that this controversy could be tried without substantial references being made to the Shareholders Agreement." (App. 29).[5]

Without any independent analysis, the Court of Appeals brushed this compelling, undisputed evidence, and the trial court's assessment of it, aside with one sentence. (App. 8). Under the standard it adopted, however, the appellate court had no authority to substitute its own judgment in this manner. *Hill, supra* at 349. This further departure from established precedent warrants this Court's intervention by writ of *certiorari*.

II. The arbitration clause is broad enough to cover the allegations in this case.

There is no question that the arbitration clause at issue is very broad. It simply provided that the parties agreed to international arbitration in Paris, France. There is not even a restriction in the clause to matters arising

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[5] Obviously, Sadoux denies the allegations on the merits. However, Sadoux recognizes that the issue before the trial court was whether the dispute is governed by the arbitration clause, not to determine the merits of the dispute. *Pennzoil Exploration*, 139 F.3d at 1067.

out of the contract. All disputes between the shareholders related in any way to Aston Holdings are to be resolved through international arbitration, not litigation. Westmoreland, as a lawyer, certainly was aware of what he was signing.

Any legal relationship between the parties is due to the Shareholders Agreement. As Judge Werlein pointed out: "Broad arbitration clauses are not limited to claims that literally arise under the contract, but rather embrace all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute." (App. 24) (quoting *Pennzoil Exploration and Production Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998)).

In its memorandum and order, the trial court also noted that any doubts concerning the scope of arbitration issues should be resolved in favor of arbitration. (App. 23), (citing *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 103 S.Ct. 927, 941 (1983)); *Chiron Corp. v. Ortho Diagnostic Systems Inc.*, 207 F.3d 1126, 1131 (5th Cir. 2000). This principle "applies with special force in the field of international commerce," and "where the clause is broad." (App. 23) (citations omitted). Both factors apply here: this case involves a broad arbitration clause in an agreement that applies to international commerce, and the dispute involves rights and liabilities of the shareholders of Aston Holdings, regardless of how Westmoreland tries to plead around it. This Court has stated the matter even more clearly: the existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if "it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Technologies*

v. Communications Workers of America, 475 U.S. 643, 650 (1986) (emphasis added).

The Court probably needs to go no further than the actual terms of the arbitration clause. The clause applies to all disputes between the shareholders related to Aston Holdings in any way. It is not limited even to a dispute arising out of the agreement, although these claims certainly do. The clause is indeed "exceedingly broad," and Westmoreland cannot show with "positive assurance" that his claims do not fall within the scope of the clause. *AT&T Technologies, supra*.

The arbitration clause in the Shareholders Agreement is broad enough to cover the claims in this case even if the Court reads a requirement into the clause that the arbitration is limited to matters arising from or related to the Shareholders Agreement. The agreement provides part of the factual foundation for every claim asserted by Westmoreland against Sadoux in this case. "If the allegations underlying the claims touch matters covered by the parties' agreement, then those claims must be arbitrated, whatever the legal labels attached to them." *WorldCrisa Corp. v. Armstrong,* 129 F.2d 71, 75 (2nd Cir. 1997); *Genesco, Inc. v. T. Kakiuchi and Co.*, 815 F.2d 840, 846 (2nd Cir. 1987). Westmoreland cannot avoid the arbitration clause simply by claiming that his causes of action are not for breach of contract.

Given: (1) the "exceedingly broad" scope of the arbitration clause; (2) the relationship between the claims and the Shareholders Agreement; (3) the strong policy in favor of arbitration; and (4) the international nature of this dispute, Westmoreland simply cannot show with "positive assurance" that this dispute is outside the scope of the

arbitration clause. The Court should reverse the judgment of the Court of Appeals and reinstate Judge Werlein's order sending this dispute to arbitration.

CONCLUSION

For the reasons set forth in this petition, and the memoranda and orders of the trial court, this Court should grant this petition for writ of *certiorari* and reverse the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Revised August 13, 2002

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-20793

JAMES H. WESTMORELAND,

Plaintiff-Appellant,

versus

ROLAND J. SADOUX, ET AL,

Defendants,

ROLAND J. SADOUX,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Jul. 18, 2002)

Before HIGGINBOTHAM, WIENER, and BENAVIDES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

James Westmoreland appeals the district court's grant of Roland Sadoux's motion to compel arbitration and stay further proceedings pending arbitration. Responding to the claim that Sadoux and co-defendant Jan Hendrickx induced Westmoreland to sell his minority shares in a company in which they controlled the remaining 93

percent, Sadoux persuaded the district court to stay the suit and compel arbitration, although defendants were not parties to any agreement to arbitrate. Plaintiff and the two entities who owned the 93 percent, which were in turn owned by Sadoux and Hendrickx, were parties to a shareholder agreement regarding the securities. We are persuaded that because this suit does not seek to enforce any duty arising out of the shareholder agreement and seeks no relief that would frustrate any right to arbitration under it, Sadoux has no right to compel arbitration. We lift the stay and vacate the order compelling arbitration and remand for further proceedings.

I

Aston Holdings was incorporated under the laws of Aruba to own and operate Dominicana Sanitary Services. Dominicana had a contract with the city of Santo Domingo to collect and dispose of waste. On the formation of Aston, James Westmoreland, Pentrade Limited, T.D.C. Trade Development Company, and Angel Action executed a shareholder's agreement. After Action sold its shares to T.D.C. and Pentrade, Westmoreland owned seven percent of Aston, while Pentrade and TDC each owned 46.5 percent. Their shareholders' agreement included an arbitration clause providing for binding arbitration in Paris, France. Sadoux is the sole owner of Pentrade and his co-defendant Jan Hendrickx is the sole owner of TDC.

Westmoreland alleges that Sadoux and Hendrickx, who controlled the day-to-day operations of Aston, lied to him about its success, telling him that Aston was struggling and that the Dominican government was planning to cancel the Santo Domingo garbage contract; that relying

upon these lies he sold his stock to them for $245,000. Two months later Sadoux and Hendrickx sold Aston for $14,000,000. This suit for fraud is against Sadoux and Hendrickx in their individual capacity. We have appellate jurisdiction under 28 U.S.C. § 1292(b), pursuant to the district court's certification of its order for interlocutory appeal.

II

As a preliminary matter, Sadoux argues that Westmoreland did not claim below that he was unable to enforce the arbitration clause against Westmoreland, and has thus waived the argument. Westmoreland, in his response to Sadoux's motion to compel arbitration, argued that "the parties have not agreed to arbitrating this dispute." The district court initially concluded that Westmoreland conceded that Sadoux is able to enforce the arbitration agreement against him. After a motion by Westmoreland, the district court recognized his contention and entered a separate order discussing the issue at length. It then certified its ruling under Section 1292(b). In short, Westmoreland did not waive this argument below.

Preliminary matters aside, we now turn to the question of whether Sadoux could compel arbitration even though he was not party to an arbitration agreement. We have frequently said that arbitration clauses are to be broadly read to implement Congressional policy expressed in the Federal Arbitration Act and the Convention on the

Recognition and Enforcement of Foreign Arbitral Awards.[1] This congressional policy is not intended to discourage the use of American courts. And they facilitate private dispute resolution by remaining open to enforce awards. Indeed, it bears emphasis that the utility of private disputes here depends heavily on access to the public courts for enforcement of the arbitral award. The point is that this twining of private and public fora facilitates the private choices of the market by enforcing only the expectation of parties captured in their contracts.[2]

It signifies that we will read the reach of an arbitration agreement between parties broadly, but that is a different matter from the question of who may invoke its protections. An agreement to arbitrate is a waiver of valuable rights that are both personal to the parties and important to the open character of our state and federal judicial systems – an openness this country has been committed to from its inception. It is then not surprising that to be enforceable, an arbitration clause must be in writing and signed by the party invoking it.[3]

Categories of dispute that cannot exit the public court houses aside, it is well and good if the parties to a private

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[1] *See, e.g., Pennzoil Exploration and Production Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1068 (5th Cir. 1998).

[2] *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 762 (2002) (noting that the FAA "ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty's choice of a judicial forum.").

[3] *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (observing that the "FAA requires that the arbitration clause being enforced be in writing.").

agreement wish to choose an alternative dispute system, but we are wary of choices imposed after the dispute has arisen and the bargain has long since been struck. And hence we will allow a nonsignatory to invoke an arbitration agreement only in rare circumstances.[4]

We have sustained orders compelling persons who have agreed to arbitrate disputes when the party invoking the clause is a nonsignatory, but only when the party ordered to arbitrate has agreed to arbitrate disputes arising out of a contract and is suing in reliance upon that contract.[5] This flex in application of these broadly stated principles rests upon our accepting the doctrine of equitable estoppel as effective in preserving the distinctions between broad readings of the reach of an arbitration clause and our formal insistence upon confining the obligations to the parties of the contract.[6] Even then we have been cautious.

Sadoux says he can invoke the arbitration agreement between Westmoreland and Pentrade because he acted as an agent for Pentrade, pointing to the Third Circuit's decision in *Pritzker v. Merrill Lynch*.[7] The district court

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[4] *See Hill v. G.E. Power Systems, Inc.*, 282 F.3d 343, 347-49 (5th Cir. 2002) (outlining the limited circumstances under which a nonsignatory can invoke an arbitration agreement).

[5] *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 531 (5th Cir. 2000) (upholding the use of equitable estoppel to compel arbitration where the claims were "intertwined with, and dependent upon" the agreement containing a broad arbitration clause).

[6] *Id.* at 528 (noting that "arbitration is a matter of contract" and thus and cannot, in general, be required for a matter involving an arbitration agreement non-signatory.")

[7] 7 F.3d 1110 (3d Cir. 1993).

cited *Pritzker* in its order. It held that agents of signatories to an arbitration clause can invoke the clause because under "traditional agency theory, [the agent] is subject to contractual provisions to which [the principal] is bound."[8] The Third Circuit concluded that this is enough to hold that a signatory's "agents, employees, and representatives are also covered under the terms of such agreements."[9]

Pritzker is in tension with decisions of the First and Ninth Circuits, which conclude that an agent or employee of a signatory cannot invoke an arbitration clause unless the parties intended to bring them into the arbitral tent. The First Circuit's decision in *McCarthy v. Azure* argued against a broad reading of *Pritzker* and held that an "overt indication that the parties intended to commit claims against" the agent "as an individual" is required in order to permit a nonsignatory agent of a signatory to invoke an arbitration clause.[10] The First Circuit stressed that the distinction between individual capacity and representative capacity is "a meaningful legal difference" and called upon parties to act "before, rather than after, the fact" and rely on "skillful drafting of contract documents" instead of "judicial juggling."[11] Similarly, the Ninth Circuit held, in *Britton v. Co-Op Banking Group*,[12] that a nonsignatory agent, officer, and employee of a signatory could not compel arbitration.[13] The key question, in the Ninth

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[8] *Id.* at 1111.

[9] *Id.*

[10] *McCarthy v. Azure*, 22 F.3d 351, 356 (1st Cir. 1994).

[11] *Id.* at 360.

[12] 4 F.3d 742 (9th Cir. 1993).

[13] *Id.* at 748.

Circuit's view, was whether the wrongdoing arose from a provision or interpretation of the contract containing the arbitration clause.[14]

The Fourth Circuit's recent decision in *Long v. Silver*,[15] which Sadoux also relies upon, offers him little aid. Although *Long* permitted an agent and shareholder to compel arbitration even though they were nonsignatories, it did not adopt *Pritzker*'s sweeping holding that agency is enough. Rather, the Fourth Circuit relied on the fact that the plaintiff invoked other provisions of the arbitral agreement in making his claims against the defendants. It observed that a plaintiff cannot invoke an agreement and claim the benefit of his status under it while attempting to escape its consequences.[16] This parallels our reasoning in *Grigson v. Creative Artists Agency*, where we permitted a nonsignatory to compel arbitration, on an equitable estoppel theory, when the signatory relies upon the terms of the written agreement to state its claims.[17]

In sum, we agree with the First and Ninth Circuits that a nonsignatory cannot compel arbitration merely because he is an agent of one of the signatories. An agent is not ordinarily liable under the contract he executes on behalf of his principal, so long as his agency is disclosed, but he is personally liable if his acts breach an independent duty.[18] If he seeks to compel arbitration, he is subject to

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[14] *Id.* at 747.

[15] 248 F.3d 309 (4th Cir. 2001).

[16] *Id.* at 320-21.

[17] *Grigson*, 210 F.3d at 527.

[18] *See* RESTATEMENT (SECOND) OF AGENCY § 320 (1958).

the same equitable estoppel framework left to other nonsignatories. It is to this framework that we now turn.

There are two circumstances under which a nonsignatory can compel arbitration.[19] First, when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. Second, when the signatory to the contract containing a [sic] arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.[20]

Westmoreland's suit does not rely upon the terms of the shareholder agreement or seek to enforce any duty created by the agreement, and there is no allegation that Sadoux acted in concert with anyone. Both Sadoux and Hendrickx elected to interpose liability insulating entities between themselves and Westmoreland. For reasons advantageous to themselves they were not parties to the shareholder agreement. And they did not negotiate an arbitration agreement regarding their personal claims and liabilities. This was no small matter. It gave them access to the courts for any claim they may have had against Westmoreland, subject to the limitation that they would have had to confront the arbitration agreement if they attempted to enforce the terms of that agreement.

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[19] *Hill*, 282 F.3d at 348.

[20] *Id.*

These vital distinctions cannot be maintained by simply deploying the standard that the reach of arbitration clauses is to be read broadly, to the distinct problems of their applicability to nonsignatories. Directly put, the courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives. To do so frustrates the ability of persons to settle their affairs against a predictable backdrop of legal rules – the cardinal prerequisite to all dispute resolution.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAMES H. WESTMORELAND,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	H-00-1767
ROLAND J. SADOUX and	§	
JAN HENDRICKX,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

Pending are Defendant Roland J. Sadoux's Motion to Dismiss [for Lack of Personal Jurisdiction] (Document No. 3); Defendant Jan Hendrickx's Motion to Dismiss and Alternative Motion to Quash (Document No. 10); Defendants' Motion to Dismiss for *Forum Non Conveniens* (Document No. 17); Defendants' Motion to Compel Arbitration and For Stay of Proceedings (Document No. 22); and Defendants' Motion to Dismiss for Failure to Join Indispensable Parties (Document No. 23). After carefully considering the motions, responses, replies, and applicable law, the Court concludes that Defendant Jan Hendrickx's Alternative Motion to Quash (Document No. 10-2) and [Defendant Roland J. Sadoux's] Motion to Compel Arbitration and for Stay of Proceedings (Document No. 22) should be granted and the remaining motions should be denied.

I. Background[1]

Plaintiff James H. Westmoreland ("Westmoreland") owned seven percent of the shares of an Aruban corporation, Aston Holdings Limited A.V.V. ("Aston"). *See* Document No. 8, Exhibit A at ¶ 2. According to Westmoreland, he sold his shares to Defendants Roland J. Sadoux ("Sadoux") and Jan Hendrickx ("Hendrickx"), relying upon several material misrepresentations made by Defendants about the financial inviability of Aston. *See id.* at ¶¶ 3-4. Before Westmoreland sold his shares to Defendants, Sadoux and Hendrickx owned, respectively, Pentrade Limited ("Pentrade") and T.D.C. Trade Development Company A.V.V. ("TDC"), corporations which collectively held the remaining ninety-three percent of Aston's shares. *See id.* at ¶ 3; Document No. 1, Exhibit C at ¶ 8. Less than two months after buying Westmoreland's shares for $245,000, Defendants allegedly sold Aston to a third party for $14,000,000. *See* Document No. 1, Exhibit C at ¶ 11.

Westmoreland, Sadoux, Hendrickx, and Angel Action Holdings, N.V. originally incorporated Aston in order to (1) purchase Dixi Sanitary Services, B.V. ("Dixi"), and (2) own and perform Dixi's contract for the collection and disposal of waste in Santo Domingo, Dominican Republic. *See* Document No. 8, Exhibit A at ¶ 2. The parties involved in

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[1] In determining Sadoux's motion to dismiss for lack of personal jurisdiction, Westmoreland's uncontroverted allegations must be accepted as true and conflicting evidence must be construed in favor of Westmoreland. *See Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000). The following statement of facts is written in accordance with that standard.

this corporation possessed diverse citizenships. Westmoreland is a citizen of Texas. Sadoux is a French citizen residing in the Dominican Republic, and his corporation, Pentrade, is a Cayman Islands corporation. *See* Document No. 7, Exhibit A at ¶¶ 2, 6. Hendrickx is a Belgian citizen residing in the Dominican Republic, and his corporation, TDC, is an Aruban corporation. *See* Document No. 16, Exhibit A at ¶¶ 2, 6.

Before Aston was incorporated, Westmoreland, Pentrade (Sadoux's corporation), TDC (Hendrickx's corporation), and Angel entered into a shareholders' agreement. *See id.*, Exhibit B. The purpose of the agreement was primarily four-fold: (1) to set forth how the shares of Aston would be distributed; (2) to provide "for the harmonious management" of Aston, (3) to limit the terms and conditions upon which Aston's shares could be transferred, and (4) to provide for the "orderly administration" of the acquisition of Dixi by Aston. *See* Document No. 16, Exhibit B, Shareholders' Agreement at 1-2. The parties agreed to distribute the net income of Dixi according to their respective shareholdings in Aston. *See id.* at 4. The agreement also contained the following arbitration clause: "This Agreement shall be governed and construed in accordance with the laws of Aruba and the parties hereby agree to the jurisdiction of the Courts of Aruba and binding international arbitration in Paris, France." *Id.*, Addendum to Shareholders' Agreement at 3.

The shareholders' agreement provided that Aston would issue its shares at a par value of one United States dollar (U.S. $1) per share and assigned the percentages of ownership interest among the shareholders. The agreement assigned forty-five percent of Aston's shares to TDC, forty-five percent to Pentrade, three percent to Angel, and

seven percent to Westmoreland.[2] *See id.*, Shareholders' Agreement at 13. The agreement provided that Aston's board of directors would consist of three members: one nominated by TDC, one nominated by Pentrade, and one which was required by local law. *See id.* at 4. The agreement assigned to "the holders of 90% of the outstanding and issued shares of [Aston]" the right to make all decisions regarding the day-to-day operations of Dixi. *Id.* at 7. The shareholders' agreement provided that no shareholder could dispose of any shareholdings in Aston unless TDC and Pentrade gave their written consent. *See id.* at 3. Westmoreland was therefore the owner of a small minority of shares, and was completely excluded from the control group.

In his complaint, Westmoreland alleges that Sadoux and Hendrickx consistently and fraudulently misrepresented that Aston was struggling and failing to make a profit, that Defendants had not recouped their initial investment in Aston/Dixi, that no suitable buyers could be found for Aston, and that there was a "very real chance" that Aston would lose Dixi's contract. *See* Document No. 1, Exhibit C at ¶¶ 10-11. Westmoreland has provided verified proof that Sadoux made these misrepresentations personally to Westmoreland on a number of different occasions and at various locations all in Houston, Texas, and in telephone calls to Texas, *see* Document No. 8, Exhibit A at ¶ 3, and that Hendrickx made these misrepresentations to Westmoreland in phone calls initiated by Hendrickx, *see* Document No. 24, Exhibit A at ¶ 3. Westmoreland alleges

[2] Angel later sold its shares to Sadoux and Hendrickx.

that, as a result of these fraudulent misrepresentations, he did not investigate whether he was owed any profits by Aston and eventually sold his shares to Defendants for $245,000, an amount of money far less than he believes he otherwise would have obtained, all to his great damage. *See* Document No. 1, Exhibit C at ¶¶ 10, 11. After selling his shares to Defendants, Westmoreland testified that he learned that all of Defendants' statements were false. *See* Document No. 8, Exhibit A at ¶ 4. Westmoreland seeks to recover his damages based upon Defendants' alleged common law and statutory fraud, breach of fiduciary obligations, and conspiracy.

II. Defendant Hendrickx's Motion to Dismiss and Alternative Motion to Quash

Hendrickx moves to dismiss or, in the alternative, to quash Westmoreland's service of process under Rule 12(b)(5), arguing that he was not served in his home or home office. "[O]nce the validity of service of process has been contested, the plaintiff bears the burden of establishing its validity." *Carimi v. Royal Carribean Cruise Line, Inc.*, 959 F.2d 1344, 1346 (5th Cir. 1992). This case was removed from state court before Westmoreland attempted to serve Hendrickx and, consequently, Westmoreland's service of process must comply with Rule 4 of the Federal Rules of Civil Procedure. *See Micromedia v. Automated Broad. Controls*, 799 F.2d 230, 233 (5th Cir. 1986) ("Once the case is removed, it becomes subject to the Federal Rules of Civil Procedure."); FED. F. CIV. P. 81(c). For individuals within a judicial district of the United States, Rule 4(e) of the Federal Rules of Civil Procedure permits service "pursuant to the law of the state in which the district court is located."

Westmoreland argues that he effected substitute service on the Texas Secretary of State under the Texas long-arm statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.044(b) (Vernon 1997 & Supp. 2001). "If the secretary of state is served with duplicate copies of process for a nonresident, he shall require a statement of the name and address of the nonresident's home or home office and shall immediately mail a copy of the process to the nonresident." *See id.* at § 17.045(a). "Since the long-arm statute authorizes substituted service, its provisions must be followed with strict compliance," *Security Pacific Corp. v. Lupo*, 808 S.W.2d 126, 127 (Tex. App. – Houston 1991), including "the requirements that the Secretary of State be furnished with the address of the [defendant's] [home] or home office," *id.*

In his unverified First Amended Petition, Plaintiff alleged that Hendrickx resides in Miami, Florida, and that his residence is 2740 North Bay Road, Miami, Florida 33140-4265. Plaintiff served the Secretary of State and requested that the Secretary forward a copy of the citation and Plaintiff's First Amended Petition to Hendrickx at his Florida residence. The Secretary of State did so, and thereafter certified that the Secretary's office (1) received a citation and Westmoreland's First Amended Petition in this case on June 6, 2000, (2) forwarded a copy of these documents, return receipt requested, on June 7, 2000, to Hendrickx at 2740 North Bay Road, Miami, FL 33140-4265, and (3) received the return receipt bearing Hendrickx's signature on June 26, 2000. *See* Document No. 24, Exhibit B. Hendrickx, however, states in his affidavit that the North Bay Road residence in Miami is not his home but the home of his children, and that his children moved from the home in June, 2000. Defendant stated he never returned to the home after June 13, 2000,

and was living in Belgium when the process was received from the Secretary. *See* Document No. 16, Exhibit A at ¶ 11.

Westmoreland's First Amended Petition did allege facts which, if true, would make Hendrickx amenable to process by use of the long-arm statute. A second requirement, however, is that Hendrickx actually must have been served in the manner required by the statute. *See Security Pacific Corp. v. Lupo*, 808 S.W.2d 126, 127 (Tex. App. – Houston 1991). This requires that process be mailed to the defendant's "home or home office" address. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.044(b) (Vernon 1997 & Supp. 2001). This statutory provision "clearly contemplates that process be mailed to defendant's [home or] home office address. There can be no other reason for the requirement that the Secretary of State be furnished with the address. . . . " *Security Pacific Corp.*, 808 S.W.2d at 127. Hendrickx has filed an affidavit that the North Bay Road residence in Miami was not his home address and, because there is not controverting verified evidence, the Court is constrained to hold that the record fails affirmatively to show strict compliance with § 17.045(a) of the Texas Civil Practice & Remedies Code. *See id.* Moreover, Hendrickx's actual receipt of process is insufficient if there was not strict compliance with the long-arm statute. *See, e.g., World Distribs. Inc. v. Knox*, 968 S.W.2d 474, 478 (Tex. App. – El Paso 1998); *Bank of America, N.T.S.A. v. Love*, 770 S.W.2d 890, 892 (Tex. App. – San Antonio 1989) ("Whether appellant received actual notice is irrelevant because a defendant's actual notice that a suit has been filed against him is not sufficient unless such notice was received in the manner prescribed by statute.").

However, since (1) Hendrickx avers that his primary residence is now in the Dominican Republic and the time constraints of Rule 4(m) do not apply to the service of individuals in foreign countries and (2) there is otherwise a reasonable prospect of proper service, Hendrickx's motion to dismiss will be denied. *See Umbenhauer v. Woog*, 969 F.2d 25, 30 (3d Cir. 1992) ("[D]ismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained"). Hendrickx's motion to quash Westmoreland's ineffective attempts to serve process is granted.

III. Sadoux's Motion to Dismiss for Lack of Personal Jurisdiction

"When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident." *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985). Since no evidentiary hearing has been held in this case, however, Westmoreland bears the burden of presenting a *prima facie* case of personal jurisdiction, and proof by a preponderance of the evidence is not required. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 854 (5th Cir. 2000). A plaintiff may present a *prima facie* case by producing admissible evidence which, if believed, would suffice to establish the existence of personal jurisdiction. *See WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989). Uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits and other evidence must be construed in the plaintiff's favor. *See Alpine View Co. v. Atlas Copco A.B.*, 205 F.3d 208, 215 (5th Cir. 2000).

A federal court may exercise jurisdiction over a nonresident defendant if (1) the long-arm statute of the forum state confers personal jurisdiction over that defendant; and (2) the exercise of such jurisdiction comports with due process under the United States Constitution. *See Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 418 (5th Cir. 1993). Because the Texas long-arm statute has been interpreted to extend as far as due process permits, the sole inquiry is whether the exercise of personal jurisdiction over a nonresident defendant comports with federal constitutional due process requirements. *See id.*

"The Due Process Clause . . . permits the exercise of personal jurisdiction over a nonresident defendant when (1) that defendant has purposefully availed himself of the benefits and protections of the forum state by establishing 'minimum contacts' with the forum state; and (2) the exercise of jurisdiction over that defendant does not offend 'traditional notions of fair play and substantial justice.'" *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 214-15 (5th Cir. 2000). Even if the parties formed their relationship in another country, "a single act by [the nonresident defendant] directed toward Texas that gives rise to a cause of action by [the plaintiff] can support a finding of minimum contacts." *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 211 (5th Cir. 1999). In particular, "[w]hen the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment." *Id.* at 213.

Westmoreland's claims against Sadoux arise from allegedly fraudulent, material statements made by Sadoux to Westmoreland in Houston, Texas, and consequently, Sadoux has established minimum contacts with Texas. *See id.* (finding a prima facie case where "the prima facie

evidence indicates that [the foreign defendant] directed affirmative misrepresentations and omissions to the plaintiff in Texas); *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 628 (5th Cir. 1998); *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989) (concluding that the plaintiff "has established a prima facie case of personal jurisdiction over the [nonresident defendants] in Texas by alleging, with affidavit support, that the [the [sic] defendants] committed the intentional tort of fraud, at least in part, through their activities in Texas). In contrast to the cases cited by Sadoux, Westmoreland's allegations are that Sadoux repeatedly, and at different times and locations in Houston, Texas, deliberately conveyed his fraudulent misrepresentations directly to Westmoreland in this forum. *See, e.g.*, *Wilson v. Belin*, 20 F.3d 644, 649 (5th Cir. 1994) (holding that specific jurisdiction did not exist where defendants "took no planned action to inject themselves or their opinions into the Texas forum" and "[e]ach simply received one unsolicited phone call from Texas"); *Memorial Hosp. System v. Blue Cross and Blue Shield of Arkansas*, 830 F.Supp. 968, 972 (S.D. Tex. 1993) (finding no specific jurisdiction in Texas where nonresident defendant "negligently answer[ed] in Arkansas a single, long-distance telephone inquiry initiated by a Texas hospital to ascertain the availability of insurance coverage").

Sadoux, who was served with citation and a copy of Plaintiff's Original Petition at Sadoux's address on San Felipe Street in Houston, Texas, contends that even if minimum contacts exist, Texas's exercise of personal jurisdiction over him would offend traditional notions of fair play and substantial justice. In particular, Sadoux argues that (1) he will face "economic and practical difficulties" in defending this case in Texas, (2) he is

unfamiliar with Texas law and did not anticipate that Texas law would apply to any of his dealings in connection with Aston, (3) Texas has no interest in this case, and (4) he will suffer local prejudice.

"Once a plaintiff has established minimum contacts, the burden shifts to the defendant to show the assertion of jurisdiction would be unfair." *Wien Air*, 195 F.3d at 215. In order to make such a showing, the defendant must make a "compelling case." *Id.* "The interests to balance in this determination are the burden on the defendant having to litigate in the forum; the forum state's interests in the lawsuit; the plaintiff's interests in convenient and effective relief; the judicial system's interest in efficient resolution of controversies; and the state's shared interest in furthering fundamental social policies." *Id.* "If a cause of action furthering fundamental social policies." [sic] *Id.* "If a cause of action for fraud committed against a resident of the forum is directly related to the tortious activities that give rise to personal jurisdiction, an exercise of jurisdiction likely comports with the due process clause, given the obvious interests of the plaintiff and the forum state" *id.*, even if litigation in the United States would place "large burdens" on the foreign defendant. *Id.*

Westmoreland, a Texas resident, was allegedly defrauded in Texas, and has an interest in obtaining convenient and effective relief in a Texas court. Likewise, the State of Texas "clearly" has an interest in this dispute because this case involves a Texas citizen allegedly defrauded in Texas by non-residents. *See Wien Air*, 195 F.3d at 215; *WNS, Inc. v. Farrow,* 884 F.2d 200, 204 (5th Cir. 1989) ("Most importantly, we note that Texas has a significant interest in redressing injuries that occur within its borders at the hands of nonresidents.").

By contrast, even assuming that litigation in the United States would impose "large burdens" on Sadoux, *see Wien Air*, 195 F.3d at 215, Sadoux has not made a compelling case that the exercise of jurisdiction over him would be unreasonable or unfair. This conclusion is fortified by Sadoux's own admission that he spends approximately thirty days per year in Houston, Texas on unrelated personal matters. *See* Document No. 7, Exhibit A at ¶ 9; cf. *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 716 (5th Cir. 1999) (stating that concerns about "the unique burdens placed upon one who must defend oneself in a foreign legal system" are *de minimis* when the foreign defendant engages in numerous business dealings in the United States). Consequently, given Westmoreland's and Texas's interests in this dispute, the exercise of personal jurisdiction over Sadoux are consistent with and do not offend traditional notions of justice and fair play. *See Streber v. Hunter*, 211 F.3d 701, 718 (5th Cir. 2000) ("[S]ince at least some of the allegations forming the basis of this lawsuit arise out of Blazier's contacts with Texas . . . the exercise of personal jurisdiction over Blazier comported with traditional notions of fair play and substantial justice"); *Wien Air*, 195 F.3d at 215; *WNS*, 884 F.2d at 204.

IV. Sadoux's Motion to Compel Arbitration and For Stay of Proceedings

Sadoux argues that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") compels Westmoreland to submit his claims to arbitration in Paris, France. The purpose of the Convention is "to encourage the recognition and enforcement of commercial arbitration agreements in international

contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. . . . " *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322, 2329 (1995). In furtherance of these goals, Congress incorporated the Federal Arbitration Act into the Convention "except where the FAA conflicts with the Convention Act's few specific provisions." *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1208 (5th Cir. 1991).

In determining whether the Convention compels the parties to arbitration, a court must make a "very limited inquiry" and determine: (1) whether there is an agreement in writing to arbitrate the dispute; (2) whether the agreement provides for arbitration in the territory of a Convention signatory; (3) whether the agreement to arbitrate arises out of a commercial legal relationship; and (4) whether a party to the agreement is not an American citizen. *See Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1144-45 (5th Cir. 1985). "If these requirements are met, the Convention requires district courts to order arbitration." *Id.* at 1145.

The parties' only dispute is whether they have a valid agreement to arbitrate Westmoreland's claims of fraud, breach of fiduciary obligation, and conspiracy.[3] Sadoux

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[3] It is undisputed that France is a signatory to the Convention and Sadoux and Pentrade are not United States citizens. Further, since this contract was made by a Texas citizen, an Aruban corporation, and a Cayman Islands corporation to govern a corporation intended to operate in the Dominican Republic, this contract affects foreign commerce and therefore is subject to the Convention and its incorporated FAA provisions. *See Allied-Bruce Terminix Cos. v. Dobson*, 115 S.Ct. 834, 840 (1995) (holding that the FAA extends as far as Congress' power under

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argues that the parties agreed to arbitrate all disputes in France. Conversely, Westmoreland argues that the parties agreed only to arbitrate disputes arising from the interpretation of the shareholders' agreement, and contends that the arbitration clause does not apply to his claims because his claims do not arise under the shareholders' agreement.

"When deciding whether the parties agreed to arbitrate a certain matter . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920, 1924 (1995).[4] However, "as a matter of federal law, doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . . " *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 103 S.Ct. 927, 941 (1983); *see also Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (5th Cir. 2000). "This applies with special force in the field of international commerce." *Pennzoil Exploration and Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1065 (5th Cir. 1998). "Arbitration should not be denied unless it can be said with

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the Commerce Clause); *Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1280 (5th Cir. 1994) ("[T]he term 'commerce' refers to interstate or foreign commerce and is to be broadly construed").

[4] The shareholders' agreement contained an Aruban choice of law provision, but none of the parties argues that Aruban law should govern whether there was a valid agreement to arbitrate. In any event, without proof of Aruban contract law, this Court must apply federal or Texas law. *See Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1006 (5th Cir. 1990) ("The law clearly states that absent sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the district court should apply the law of the forum."); *see also* FED. R. CIV. P. 44.1.

positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Id.* at 1067 (internal quotations omitted).

"The presumption of arbitrability is 'particularly applicable where the clause is . . . broad.'" *Webb v. Investacorp, Inc.*, 89 F.3d 252, 259 (5th Cir. 1996) (quoting *AT&T Technologies, Inc. v. Communications Workers of Am.*, 106 S.Ct. 1415, 1419 (1986)). "Broad Arbitration clauses . . . are not limited to claims that literally 'arise under the contract,' but rather embrace all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute." *Pennzoil*, 139 F.3d at 1067. The arbitration clause in this case – "the parties hereby agree to . . . binding international arbitration in Paris, France" – is exceedingly broad because it neither specifies nor excludes particular disputes that may be arbitrated. *See, e.g., Webb*, 89 F.3d at 259 (characterizing the following arbitration clause as "broad": "It is hereby agreed by the parties that all proceedings will be subject to arbitration before the NASD").

Under the strong presumption of arbitrability given to the broad arbitration clauses in contracts involving foreign commerce, the parties have a valid agreement to arbitrate Westmoreland's claims of fraud, breach of fiduciary obligations, and conspiracy because these claims have a "significant relationship" to the shareholders' agreement.[5] The

[5] Westmoreland does not dispute that Sadoux, as an agent for Pentrade, is able to enforce the arbitration agreement against Westmoreland. *See, e.g., Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993) ("In keeping with the federal policy favoring arbitration, we share the views of the Courts of Appeals for the

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shareholders' agreement defined the relationships between Westmoreland, Pentrade, TDC, and Angel with respect to their operation of Aston, and Westmoreland's claims against Sadoux arise out of Sadoux's alleged misuse of the control over Aston granted to Pentrade (and consequently to Sadoux) by the shareholders' agreement. *See Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 338 (7th Cir. 1984) (holding that a claim of fraud under a contract was subject to arbitration because the claim arose out of and related to a contract which defined the business relationship between the parties). For instance, Westmoreland alleges that Sadoux used his control over Aston and his superior knowledge of Aston's affairs in order to misrepresent Aston's financial viability and induce Westmoreland to sell his shares for much less than their true value. According to Westmoreland, Sadoux's alleged misrepresentations further damaged Westmoreland by preventing him from discovering that he was entitled to profits under the shareholders' agreement. In other words, Sadoux allegedly used the control conferred upon him (through Pentrade) by the shareholders' agreement in order to defraud Westmoreland out of money and other benefits to which Westmoreland was entitled under the shareholders' agreement. Under these circumstances, Westmoreland's claims against Sadoux have a "significant relationship" to the shareholders' agreement, and consequently it cannot be said with positive assurance that this arbitration clause "is not susceptible of an interpretation which would cover the dispute[s] at issue." *Pennzoil*, 139 F.3d at 1067. Sadoux

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Sixth and Ninth Circuits and will extend the scope of the arbitration clauses to agents of the party who signed the agreements.").

is therefore entitled under the agreement and the Convention to have this controversy decided by international arbitration in Paris, France.

VI. Sadoux's Motions to Dismiss for Failure to Join Indispensable Parties and for *Forum Non Conveniens*

Although Sadoux made his motion to compel arbitration subject to his motions to dismiss for failure to join an indispensable party and for *forum non conveniens*, the Court declines to reach the merits of Sadoux's last two motions, both of which are premised on his argument that it would be unfair to require him to defend against Westmoreland's claims in a Texas court. Neither motion affects the Court's jurisdiction over this case or its authority to order the parties to arbitration. *See, e.g., Koehler v. Dodwell*, 152 F.3d 304, 309 n.7 (4th Cir. 1998); *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998). Sadoux's motions to dismiss for failure to add an indispensable party and for *forum non conveniens* are therefore denied as moot.

VII. Order

Based on the foregoing, it is

ORDERED that Defendant Roland J. Sadoux's Motion to Dismiss [for Lack of Personal Jurisdiction] (Document No. 3) and Defendant Jan Hendrickx's Motion to Dismiss (Document No. 10-1) are DENIED. It is further

ORDERED that Defendant Jan Hendrickx's Alternative Motion to Quash (Document No. 10-2) is GRANTED, but without prejudice to Plaintiff causing proper service to be made on Hendrickx. It is further

ORDERED that [Defendant Roland J. Sadoux's] Motion to Compel Arbitration and For Stay of Proceedings (Document No. 22) is GRANTED. Further proceedings in Plaintiff's case against Sadoux are temporarily STAYED to permit the parties to commence international arbitration proceedings in Paris, France. Within ninety (90) days after the entry of this Order, Westmoreland and Sadoux (joined by Hendrickx if he at that time has become a party to the arbitration) shall file a joint report advising the commencement and status of such arbitration proceedings. After receipt of that report, the Court expects to extend the STAY of further proceedings in this case until completion of the arbitration or until further order of the Court. Because Hendrickx presently has not sought enforcement of the arbitration clause, further judicial proceedings by Westmoreland against Hendrickx are not affected by this Order. It is further

ORDERED that [Defendant Roland J. Sadoux's] Motion to Dismiss for *Forum Non Conveniens* (Document No. 17) and [Defendant Roland J. Sadoux's] Motion to Dismiss for Failure to Join Indispensable Parties (Document No. 23) are DENIED as moot.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 5th day of March, 2001.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAMES H. WESTMORELAND, Plaintiff, v. ROLAND J. SADOUX AND JAN HENDRICKX, Defendants.	)	CIVIL ACTION NO. H-00-1767

ORDER

Pending are Plaintiff's Motion for Leave to File its Amended Complaint (Document No. 38), and Plaintiff's Motion to Reconsider (Document No. 39), to which Defendant Sadoux has filed his response in opposition.

Plaintiff proposes to amend his petition to omit a portion of his initial claim, namely, allegations regarding Defendant's failure to distribute profits to which Plaintiff was entitled under the Shareholders' Agreement. Plaintiff's case would then be limited to a fraud claim regarding the sale of his stock to Defendants based upon their fraudulent misrepresentations to him and, he argues, his case therefore would not have a significant relationship to the Shareholders' Agreement.

After careful consideration of the submissions made by the parties, it appears that even the proposed amended complaint necessarily bears a substantial relationship to the Shareholders' Agreement. The context in which the alleged fraud occurred – even under the proposed Second Amended Complaint – originates in the Shareholders'

Agreement by which Plaintiff acquired 7% of the shares of Aston, Pentrade (Sadoux) initially acquired 45% of the shares, Trade Development Company (Hendrickx) initially acquired 45% of the shares, Defendants and an Aruba citizen served as sole officers and directors of Aston, and Defendants consistently informed Plaintiff that the business was struggling, that they were actively seeking someone to purchase the business, that Aston was not generating any profits, and that Plaintiff relied upon Defendants' misrepresentations. The Shareholders' Agreement, of course, by which Plaintiff acquired his 7% ownership interest, also provided that Plaintiff could not sell his shares without the written consent of Trade Development Company and Pentrade and, further, that the holders of 90% of the outstanding and issued shares of Aston had the right to make all decisions regarding the day-to-day operations of Dixi. The entire setting for the fraud, therefore, arises out of and bears significant relationship to the Shareholders' Agreement entered into by these three parties, Westmoreland, Sadoux, and Hendrickx. Westmoreland now proposes not to raise issues of contract interpretation or performance, but the tort claims that Westmoreland does wish to allege are inextricably linked to the Shareholders' Agreement that formed the business relationship between these three persons. The alleged tortious conduct of Defendants, if anything, is exacerbated by the contractual obligations that Defendants owed to Westmoreland. It is not plausible to think that this controversy could be tried without substantial references being made to the Shareholders' Agreement. Accordingly, because a substantial relationship to the Shareholders' Agreement is present even under the proposed Second Amended Complaint, it is

ORDERED that Plaintiff's Motion for Reconsideration of the Order Entered March 6, 2001, is DENIED. Because the proposed Second Amended Complaint appears to have been sought only to avoid enforcement of the arbitration clause, and because the Court assumes that Plaintiff, once the arbitration commences, would desire also to recover the damages to which he may be entitled as a result of the failures of Defendants to account to him for profits, Plaintiff's Motion for Leave to File its Amended Complaint (Document No. 38) is DENIED as moot.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED at Houston, Texas on this 24th day of April, 2001.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20793

JAMES H. WESTMORELAND

Plaintiff-Appellant

v.

ROLAND J. SADOUX, ET AL.

Defendants

ROLAND J. SADOUX

Defendants-Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Opinion 7/18/02, 5 Cir., ___, ___ F.3d ___)

(Filed Aug. 26, 2002)

Before HIGGINBOTHAM, WIENER and BENAVIDES, Circuit Judges, PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in the regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Higginbotham
United States Circuit Judge

SHAREHOLDERS AGREEMENT & ADDENDUM

THIS AGREEMENT is made as of this 31st day of December, 1996, **BETWEEN**

T.D.C. TRADE DEVELOPMENT COMPANY A.V.V. (hereinafter referred to as "T.D.C.")

OF THE FIRST PART:

- and -

ANGEL ACTION HOLDINGS, N.V. (hereinafter referred to as "Angel")

OF THE SECOND PART;

- and -

JAMES H. WESTMORELAND as Trustee ("Second Party") (hereinafter referred to as "JHW")

OF THE THIRD PART;

- and-

PENTRADE LIMITED, a Cayman Islands Company (hereinafter referred to as "Pentrade")

OF THE FOURTH PART
(collectively referred to as the "Shareholders")

- and-

ASTON HOLDINGS LIMITED A.V.V. (hereinafter referred to as "Company")

OF THE FIFTH PART.

WITNESSETH:

WHEREAS the Shareholders together shall own all of the issued and outstanding shares of the Company, a

Curacao, Netherland Antilles Company to be incorporated in the amounts and percentages as set out in Attachment "A" hereto;

AND WHEREAS the Shareholders deem it in their best interest to provide for the harmonious management of the business of the Company;

AND WHEREAS the Shareholders are desirous to limit, to the extent hereinafter provided, the terms and conditions upon which the shares of the Company may be sold or otherwise transferred;

AND WHEREAS, the Shareholders, prior to forming the Company, desire to provide for the orderly administration of the acquisition by the Company of all shares of DIXI SANITARY SERVICES, B.V., a/k/a ATTWOODS SANITARY SERVICES, B.V., a business carried on in the Dominican Republic involved with waste collection and disposal.

AND WHEREAS, there shall be a total of 100 authorized, issued and outstanding, and fully paid shares at one United States dollar (US$1) par value per Share of the Company representing all the issued shares of the Company.

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the mutual covenants and agreements hereinafter contained, the sum of One Dollar ($1.00) now paid by each of the parties hereto to the other and other good and valuable consideration, the receipt and sufficiency of which being hereby acknowledged by each of the parties hereto, it is hereby agreed among the parties as follows:

1. *TERM.* This Agreement shall come into force and effect as of the date set out above and shall continue in force until all of the shares are beneficially owned by one Shareholder or until this Agreement is terminated in writing by all of the registered and beneficial shareholders of the Company.

2. *COMPANY TO BE BOUND.* The Company covenants and agrees to carry on its business and affairs in accordance with the provisions of this Agreement, to be bound by the provisions of this Agreement to the full extent that it has the capacity and power to do so and to take no action which would constitute a contravention of any of the terms or provisions hereof.

3. *PRE-INCORPORATION PROCEDURES.*

   a) T.D.C. has executed the Share Purchase Agreement with BFI and ATTWOODS HOLDINGS, LTD. for the purchase of all outstanding and issued shares of DIXI SANITARY SERVICES B.V.

   b) T.D.C. has agreed to assign the Share Purchase Agreement to T.D.C., Angel, JHW and Pentrade who shall become the beneficial owners of the Agreement.

   c) T.D.C., Angel, JHW and Pentrade have agreed to form a new company to be called Aston Holdings Company, A.V.V.

   d) T.D.C. shall assign the Agreement to the new company before closing; estimated at 15 days.

   e) All funding for the acquisition of 100 percent of the shares of DIXI SANITARY SERVICES

B.V., will be advanced 100 percent by T.D.C. and Pentrade or their assigns.

f) The Shareholders are entering into this Agreement in respect of the Company, which shall be the assignee of the contract to purchase the shares of DIXI SANITARY SERVICES B.V. This shall in turn, serve as the definitive "Shareholders' Agreement" and shall provide for each party to own the percent designated in Attachment "A" next to their name, and, the same shall reflect the percent of the issued and outstanding shares of the Company upon incorporation.

g) The parties hereto agree to cause the Company to enter into this Agreement as a signatory hereto upon its incorporation.

4. *RESTRICTIONS UPON TRANSFER AND ENCUMBRANCE*

a) Except as expressly otherwise provided herein, no Shareholder may dispose of all or any part of its share holdings in the Company without obtaining written consent of the holders of 90% of the issued shares.

The term "dispose" shall include, but shall not be limited to, selling, assigning, pledging, hypothecating, encumbering, and in any way transferring erring [sic] such certificates.

b) There shall be no transfer by a shareholder to anyone, unless TDC and Pentrade give their consent to such transfer in writing. However, should TDC and Pentrade negotiate to sell their shares, their offer to sell

must also include the shares of Angel and JHW, as well.

5. *FUTURE TRANSACTIONS*

It is agreed that any and all extensions of the existing contract in the City of Santo Domingo in the Dominican Republic involving the collection of garbage/waste, shall be for the benefit of the Company and its Shareholders and shall be considered an extension of the existing contract held by DIXI and this Agreement.

6. *OPERATIONAL PROCEDURES*

a) Board of Directors. The Shareholders agree that the Company shall be governed by a Board of Directors consisting of three (3) members and the Shareholders shall vote their shares to cause and maintain the election to the Board of Directors of one nominee of TDC, and one nominee of Pentrade. The Third Director is required by local law.

b) Quorum. The quorum of the Board shall be any two directors provided that they are nominees of TDC and Pentrade.

c) Preferential Profit Distribution. The Shareholders agree that, for legal and marketing advice James H. Westmoreland, P.C. and Angel Action Holdings Company will be paid prior to January 15, 1997 the sum of $10,000.00 each. Said payment shall be construed as an advance against the first distribution of profits in accordance with subparagraph "c)" below.

d) Distribution of Net Income of DIXI. The Shareholders agree that the net income earned by DIXI shall be distributed to

Shareholders in accordance with their respective share ownership in the Company. As used in this Agreement, "net income" shall mean net income of DIXI (calculated in accordance with generally accepted accounting principles in the United States) after deduction for and payment of all operating expenses and the return of T.D.C.'s and Pentrade's investment of purchase monies for the shares of DIXI. For the sake of certainty, it is hereby agreed that all funds whether of a capital nature or a loan advanced by TDC and Pentrade must be repaid to the party advancing same prior to any distribution of the net income of DIXI, with the exception of US$275,000.00 paid by Pentrade Limited to a former shareholder.

e) Investment of Additional Capital. In the event that DIXI's operations reflect at any time a negative cash flow, the Shareholders shall be permitted to contribute capital or lend funds to DIXI via the Company in accordance with their respective stock ownership percentage and in accordance with paragraph 8 hereof. Before accepting any loan from a Shareholder, DIXI through the Company must provide written notice to each Shareholder describing its capital needs and stating the sum that each Shareholder should provide if he elects to make a loan. If a Shareholder elects not to extend funds to DIXI, the other Shareholders shall be permitted to lend to DIXI in such amount reasonably projected to cover the negative cash flow.

f) Meetings. The Shareholders agree that meetings shall be scheduled from time to

time as considered necessary and convenient by the holders of 90% of the issued shares of the Company.

7. *FINANCING*

a) Source of Funds. The Company to the extent possible will borrow any funds required to finance its operations or the operations of DIXI from commercial sources. The Shareholders shall not be required to provide directly or indirectly, any additional financing to the Company or to assist the Company in any manner whatsoever in obtaining financing except as hereinafter expressly provided.

b) Shareholder Loans. Notwithstanding the provisions of paragraph 7(a) hereof, any Shareholder, may at any time and from time to time at his option if and when requested by the Company advance to the Company such additional funds ("Shareholder Loans") as the Company may require to finance its operations or the operations of DIXI upon such terms and conditions as shall be agreed upon at the time of each such advance. Any Shareholder who makes any advances to the Company pursuant to the provisions of this agreement shall be entitled to receive payment in full of such loan (together with interest at twice the LIBOR rate) prior to the distribution of net income to the other Shareholders.

c) Repayment of Third Party and Shareholder Loans. The Company shall apply all available funds not required to conduct its business to repay, first, any all third party loans and, second, all initial and subsequent

Shareholder Loans. All Shareholder Loans shall be repaid in proportion to the relative equity interests of the Shareholders in the Company at the time of repayment, provided that such proportional repayment shall only be made after any Shareholder with Shareholder Loans exceeding that Shareholder's proportional amount of all Shareholder Loans is first repaid the amount of such excess in total. The Board of Directors shall not declare and the Company shall not pay dividends at any particular time if any Shareholder Loans remain outstanding at that time without the prior written consent of the holders of 90% of the outstanding and issued Shares.

8. *RIGHT OF FIRST REFUSAL*

a) Third Party Offer. If at any time a Shareholder (the "Disposing Shareholder") wishes to sell all, but not less than all, of the Shares owned by the Disposing Shareholder (the "Offered Shares") to any person or persons (the "Third Party"), the Disposing Shareholder shall first obtain from the Third Party a bona fide offer (the "Third Party Offer") which the Disposing Shareholder is prepared to accept and which is of a nature and type that could be offered to the Disposing Shareholder on identical terms by the other Shareholders (the "Other Shareholders"), and then give the Other Shareholders written notice (the "Offer Notice") containing the identity of the Third Party the terms and conditions of the Third Party Offer, a true copy of the Third Party Offer and an offer (the Disposing Shareholder's Offer") to sell the Offered Shares to the Other

Shareholders at the same price per share and upon the same terms and conditions as are contained in the Third Party Offer. The Disposing Shareholder's Offer shall be irrevocable for a period of thirty (30) days after receipt of the Offer Notice by the Other Shareholders.

b) Acceptance by Other Shareholders. The Other Shareholders may, within thirty (30) days after receipt of the Offer Notice, accept the Disposing Shareholder's Offer by giving written notice thereof, which shall be irrevocable, to the Disposing Shareholder (the "Acceptance Notice").

c) Piggyback Right. The Other Shareholders shall have the right to require as a condition of sale by the Disposing Shareholder to the Third Party that the Third Party purchase all, but not less than all, of the issued and outstanding shares in the capital of the Company owned by the Other Shareholders (the "Piggyback Shares") upon the same terms and conditions as contained in the Third Party Offer. Such right shall be exercised by giving written notice, which shall be irrevocable, to the Disposing Shareholder (the "Piggyback Notice") within thirty (30) days after receipt of the Offer Notice. In the event that the Third Party does not wish to purchase the Piggyback Shares as above prescribed, the Disposing Shareholder shall not be entitled to sell the Offered Shares to the Third Party.

d) Rejection of Disposing Shareholder's Offer. If within the said thirty (30) days period, the

Other Shareholders do not give an Acceptance Notice as provided in paragraph 8(b), then the Disposing Shareholder's Offer shall be deemed to have been rejected and the Disposing Shareholder may sell the Offered Shares to the Third Party on the exact same terms and conditions contained in the Third Party Offer, subject to the Third Party also purchasing the Piggyback Shares pursuant to any giving of a Piggyback Notice as provided in paragraph 8(c). Any Third Party not acquiring all of the Shares shall agree to be bound by the provisions of this Agreement as required by paragraph 10(e) hereof. The sale to the Third Party must be completed on the closing date specified in the Third Party Offer or within fifteen (15) days thereafter. If any of the terms and conditions contained in the Third Party Offer are altered except for the closing date as aforesaid, such offer shall be deemed for purposes hereof to be a new offer which, pursuant to the provisions of this paragraph 8, shall be first offered to the Other Shareholders. The Disposing Shareholder shall provide reasonable proof to the Other Shareholders that the sale of the Offered Shares was completed at the price and upon the terms and conditions contained in the Third Party Offer before the Third Party shall be entitled to be registered as a shareholder of the Company.

e) Third Party to be Bound by Agreement. A Third Party Offer shall contain a term requiring the Third Party, as a condition of closing, to duly execute and deliver to the Other Shareholders and to the Company an

agreement to be bound by the terms and conditions of this Agreement, which agreement is to be in form and substance satisfactory to the solicitors for the Other Shareholders and the Third Party acting reasonably. The Shareholders covenant and agree to vote their shares and exercise their influence and to make, do and execute, or cause to be made, done and executed, all such acts, deeds, documents, instruments or assurances as may be required to register the Third Party as a shareholder and to otherwise comply with the provisions of this Agreement.

f) Terms and Conditions. Any sale pursuant to paragraph 8 hereof shall be made at the price and upon the terms and conditions set out in the Third Party Offer.

9. *MANAGEMENT OF DIXI*

All decisions regarding the day to day operations of DIXI shall be made by the holders of 90% of the outstanding and issued shares of the Company which in turn shall own 100% of the outstanding and issued shares of DIXI. The sale of shares or assets of DIXI shall require the approval of the holders of 90% of the outstanding and issued shares of the Company. The election of members to the Board of Directors of DIXI shall require the approval of the holders of 90% of the outstanding and issued shares of the Company.

10. *SUBSEQUENT SIGNATORIES*

Any persons not initially parties hereto who become Shareholder(s) of the Company must execute and acknowledge a copy of this Agreement, and agree to be bound hereby provided, any person or entity who

becomes a Shareholder of the Company after the execution of this Agreement, shall be deemed to have consented hereto and to be bound hereby as if he had actual notice of this Agreement at the time he acquired the shares, whether or not he had actually executed a copy of this Agreement.

11. *VIOLATION OF TRANSFER RIGHT*

Any transfer or attempt to transfer any shares in the Company by any party hereto, with or without consideration, in violation of the terms and conditions of this Agreement, shall not be valid and the transferee thereof shall not be deemed to be the holder of said shares or entitled to any of the rights thereof. The Company shall not transfer any such shares on its books to the purported transferee thereof; save and except a transfer in accordance with the provisions of paragraphs 8, 9 and 15 herein. Any transfer of shares in the Company by a Shareholder to a Company which is controlled as to all the outstanding and issued shares by such Shareholder shall be considered as a permitted transfer in accordance with this Agreement providing the Transferee enters into an agreement whereby it agrees to be bound by all the terms and conditions of this Shareholders Agreement.

12. *AMENDMENTS*

The Company upon the approval of the holders of all of the issued and outstanding shares of the Company may alter, amend or terminate this Agreement by a written agreement to that effect signed by all the Shareholders and the Company.

13. *DEATH AND/OR INCAPACITY OF SHAREHOLDER*

Upon the death and/or permanent incapacity of a Shareholder, the Company by a vote of 45% of its

other Shareholders, may within 90 days after the appointment of a legal representative of a decedent's estate or the final determination of his permanent incapacity, purchase all or part of the decedent's shares in the Company, whether now owned or hereafter acquired by him, for fair market value, and pay the purchase monies to said legal representative of the decedent's estate. In such event, the acquired shares shall become Treasury Shares.

Upon the death of a Shareholder, in the event that there are no life insurance proceeds available from which the Company can effect such a purchase, payment required by this section shall be made by paying to the selling Shareholder's estate at least 50% in cash of the purchase price determined pursuant to this paragraph with the balance together with interest thereon at the rate of 10% per annum, due no later than one (1) year after the down payment (50%) was made, provided; however, any delay in payment caused by the decedent's estate proceedings, or out of the control of the Company, shall extend such payments with interest accrued accordingly.

The privilege to purchase a deceased Shareholder's holdings in the Company in the event the deceased Shareholder's estate agrees, shall be solely that of the Company, and the heirs or estate of the deceased Shareholders may elect to remain Shareholder of the Company.

14. *NOTICE*

(1) All notices, demands, approvals, consents, agreements, offers, payments or requests (a "Notice") required or permitted to be given hereunder shall be in writing and may be given by personal delivery or by prepaid registered post or written telegraphic or electronic communication

which results in a written or printed notice being given to the applicable address set forth below:

(a) in the case of the TDC:

(b) in the case of the JHW:

(c) in the case of Angel:

(d) in the case of the Pentrade:

(e) in the case of the Company:

(2) Any Notice, if delivered, shall be deemed to have been validly and effectively given and received on the date of delivery. Notice by prepaid registered post shall be deemed given five (5) business days after sending. Any Notice, if sent by telegraphic or electronic communication, shall be deemed to have been validly and effectively given and received on the date of transmission.

Any such notice, request, demand or other communication given by prepaid registered mail will be deemed to have been given on the 5th business day following the date of mailing.

Provided, however, that in the event of the disruption of postal services, any notice, request, demand or other communication required to be given or made under this Agreement will be hand delivered.

15. *SUCCESSORS AND ASSIGNS*

This Agreement will enure to the benefit of and be binding upon the parties and their respective heirs, legal representatives, successors and assigns.

16. *JURISDICTION*

The Agreement shall be governed and construed in accordance with the laws of the Cayman Islands, and

the parties hereby agree to the jurisdiction of the Courts of the Cayman Islands.

17. *PREVAILING PARTY / COSTS*

In the event any proceeding is commenced by any party hereto to enforce any of the terms, covenants and conditions of this Agreement, the prevailing party shall be entitled to reimbursement of all attorneys fees and court costs including but not limited to appellate proceedings.

18. *HEADINGS*

Paragraph headings are not to be considered part of this Agreement, are included solely for convenience of reference and are not intended to be full or accurate descriptions of the contents of each heading.

19. *CONSTRUCTION*

In the construction of this Agreement, whether or not so expressed, words used in the singular or in the plural, respectively, include both the plural and the singular.

20. *ENTIRE AGREEMENT*

This Agreement constitutes the entire Agreement between the parties and supersedes all prior and contemporaneous offers, negotiations and agreements. The parties acknowledge that there are no other terms and conditions of this Agreement expressed or implied, written or oral.

21. *COUNTERPARTS*

This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same instrument.

22. *SEVERABILITY*

If any provision of this Agreement is held to be invalid by any court having jurisdiction, such holding will not invalidate the remainder of this Agreement.

IN WITNESS WHEREOF the parties hereto have affixed their hands and seals as of the date first hereinabove written.

WITNESSES:

T.D.C. TRADE DEVELOPMENT COMPANY A.V.V.

/s/ [Illegible]

BY: /s/ Jan Hendrickx
AUTHORIZED AGENT

ANGEL ACTION HOLDINGS CO. N.V.

/s/ [Illegible]

BY: /s/ [Illegible]
AUTHORIZED AGENT

/s/ [Illegible]
/s/ Tina Russell

/s/ James H. Westmoreland
JAMES H. WESTMORELAND,
AS TRUSTEE

PENTRADE LIMITED

BY: /s/ Roland J. Sadoux
AUTHORIZED AGENT

ASTON HOLDINGS LIMITED A.V.V.,
a company to be incorporated

by: /s/ Jan Hendrickx
T.D.C. TRADE DEVELOPMENT

ATTACHMENT A

A. Shareholders and Percentage of Ownership

		Shares	Percentage
I.	T.D.C. Trade Development Company, A.V.V.	45	45%
II.	Angel Action Holdings Co. N.V.	3	3%
III.	James H. Westmoreland	7	7%
IV.	Pentrade Limited	45	45%
		100	100%

ADDENDUM TO SHAREHOLDERS AGREEMENT

This Addendum to Shareholders Agreement reflects corrections and changes to the original Shareholders Agreement and shall become a part thereof as though executed on the date of the Agreement. Reference is made to each page of the Shareholders Agreement to identify the changes made by this Addendum.

Page 1 THIS AGREEMENT is made as of this 15th day of March, 1997.

WHEREAS the Shareholders together own all of the issued and outstanding shares of the Company, an Aruba Company, in the amounts and percentages as set out in Attachment "A" hereto.

Page 2 AND WHEREAS, the Shareholders, desire to provide for the orderly administration of Attwoods, BV, (Attwoods) a Netherlands corporation, (or any subsequent

change of name accepted by the shareholders), and any DBA names or corporate names used in the Dominican Republic for the business of waste collection and disposal pursuant to any contracts for such services with any governmental body in the Dominican Republic.

AND WHEREAS, there shall be a total of 6,000 authorized shares of the Company, with a par value of one USD (US$1) per share, and all shares issued at any time, shall be issued pursuant to the percentages set forth in Exhibit "A" hereto.

3. *PRE-INCORPORATION PROCEDURES*

a) T.D.C. has executed the Purchase Agreement with BFI and ATTWOODS HOLDINGS, LTD. and related companies for the purchase of all outstanding and issued shares of Attwoods.

b) T.D.C. has assigned the Purchase Agreement to the Company, which is the beneficial owner of the Agreement and the shares of Attwoods.

Page 3

c) All funding for the acquisition of 100 percent of the shares of Attwoods has been advanced 100% by T.D.C. and Pentrade.

d) The Shareholders are entering into this Agreement in respect of the Company as the assignee of the contract to purchase the shares of Attwoods. This shall in turn, serve as the definitive "Shareholders' Agreement" and shall provide for each party to own the percent designated in Attachment "A" next to their name, and, the same shall reflect the

percent of the issued and outstanding shares of the Company.

5. *FUTURE TRANSACTIONS*

It is agreed that any and all extensions of the existing contract in the City of Santo Domingo in the Dominican Republic involving the collection and disposal of garbage/waste, shall be for the benefit of the Company and its Shareholders and shall be considered an extension of the existing contract held by Attwoods and this Agreement. Should any of the parties to this Agreement become involved individually or through a company for the waste collection and/or disposal in any other part of the Dominican Republic, the other Shareholders shall be offered the opportunity to participate in the same percentages set forth in Exhibit "A".

Page 4.

a) Board of Directors. (The last line of this paragraph is changed to the following): The Third Director is required by the local law of the country.

c) Preferential Profit Distribution. The Shareholders agree that, for legal and marketing advice James H. Westmoreland, P.C. and Angel Action Holdings Company have been paid the sum of $10,000.00 each. Said payment shall be construed as an advance against the first distribution of profits in accordance with subparagraph "d" below.

d) Distribution of Net Income of the Company. The Shareholders agree that the net income earned by the Company,

or its operating DBA or any other company in the Dominican Republic, (collectively referred to as the Operating Company) shall be distributed to Shareholders in accordance with their respective share ownership in the Company. As used in this Agreement, "net income" shall mean net income of the Operating Company (calculated in accordance with generally accepted accounting principles in the United States) after deduction for and payment of all operating expenses and the return of T.D.C.'s and Pentrade's investment of purchase monies for the shares of Attwoods. ~~It is further agreed that none of the Shareholders or Directors shall receive a salary from the Operating Company and sole remuneration shall be in the distribution of income in accordance with Exhibit "A".~~ For the sake of certainty, it is hereby agreed that all funds whether of a capital nature or a loan advanced by TDC and Pentrade must be repaid to the party advancing same prior to any distribution of the net income of the Operating Company with the exception of US$275,000.00 paid by Pentrade Limited to a former subscriber to shares of the Company.

Page 5. f) Meetings. The Shareholders agree that meetings shall be scheduled from time to time as considered necessary and convenient by the holders of 90% of the issued shares of the Company. However, there shall ~~not~~ be ~~less than two (2)~~ at least one Shareholders Meetings per

fiscal year in the Dominican Republic, ~~including one meeting~~ held the day of the close of the books for each fiscal year.

Page 7. 9. *MANAGEMENT OF THE OPERATING COMPANY*

All decisions regarding the day to day operations of the Operating Company shall be made by the holders of 90% of the outstanding and issued shares of the Company and the Company shall own 100% of the issued and outstanding shares of any Operating Company. The

Page 8. sale of the shares or assets of the Operating Company shall require the approval of the holders of 90% of the outstanding and issued shares of the Company. The election of members to the Board of Directors of the Operating Company shall require the approval of the holders of 90% of the outstanding and issued shares of the Company. The 90% Shareholders of the Company shall cause the Operating Company to prepare and deliver to the Company, quarterly profit and loss statements and income and expense summaries. Further, the Company and its shareholders shall be provided proof of the timely filing of all required tax returns.

Page 10 *JURISDICTION*

This Agreement shall be governed and construed in accordance with the laws of Aruba and the parties hereby agree to the jurisdiction of the Courts of Aruba and binding international arbitration in Paris, France.

Page 11 *ENTIRE AGREEMENT*

This Agreement, Attachment "A" and any Addendums hereto constitutes the entire Agreement between the parties and supersedes all prior and contemporaneous offers, negotiations and agreements. The Parties acknowledge that there are no other terms and conditions of this Agreement expressed or implied, written or oral.

Witnesses:	Parties:
/s/ [Illegible]	T.D.C. TRADE DEVELOPMENT COMPANY A.V.V.
/s/ [Illegible]	By: /s/ Jan Hendrickx Authorized Agent
_____	ANGEL ACTION HOLDINGS CO. N.V.
_____	By: /s/ [Illegible] Authorized Agent
/s/ [Illegible]	/s/ James H. Westmoreland James H. Westmoreland, as Trustee
/s/ Tina Russell	
/s/ [Illegible]	PENTRADE LIMITED
_____	BY: /s/ Roland J. Sadoux Authorized Agent
/s/ [Illegible]	ASTON HOLDINGS LIMITED A.V.V.,
_____	by: /s/ [Illegible] Attorney-in-Fact